No. 22573

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MILLER REDWOOD COMPANY,
Respondent.

On Petition for Enforcement for an Order of the National Labor Relations Board

BRIEF FOR THE MILLER REDWOOD COMPANY

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SUBJECT INDEX

INDEX OF AUTHORITIES

Page

Cases Cited

INDEX OF AUTHORITIES (Cont.)

STATUTES

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RESPONDENT'S BRIEF

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of its order issued against respondent on May 5, 1967. The Board's de-

cision and order (R. 28-34, 13-23)[1] are reported at 164 NLRB No. 52. This Court has jurisdiction of the proceeding, the alleged unfair labor practices having occurred in Crescent City, California, where respondent operates a lumber mill.

STATEMENT OF THE CASE

Respondent asserts that the statement of the case offered by petitioner is incomplete and inaccurate in some aspects. However, in the interests of brevity, respondent does not make a supplemental statement of the case but rather relies on the facts as developed and substantiated in its argument.

ARGUMENT

I. The record as a whole does not offer substantial evidence that respondent interfered with, restrained or coerced its employees in violation of Section 8 (a)(1) of the Act.

Mr. Fred McDonald, a witness for the general counsel, testified he heard Mr. Schroeder say that if he found out who started the union[2] they would be out. McDonald could not remember who was present, but recalled that the conversation took place on a

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[1] References Designated "R." are to Volume I of the record as reproduced, pursuant to Rule 10 of this Court. "Tr." refers to the portions of the stenographic transcript of the unfair labor practice hearing, reproduced pursuant to Court Rules 10 and 17.

[2] The United Brotherhood of Carpenters and Joiners of America, A.F.L.-C.I.O.

morning (Tr. 92) in May (Tr. 89, 90). The first notice Mr. Schroeder had of union activity was a letter from the union dated May 27, 1965[3] which he received on May 28, and opened that afternoon (R. 14; Tr. 172). He then called the Timber Operator's Council in Portland, Oregon and was advised not to make any comments about union activities (R. 14; Tr. 173-174). The mill did not operate on May 29, 30 or 31 (Tr. 172-173). There was therefore no morning in May when the statement could possibly have been made. These facts taken together conclusively demonstrated that Mr. Schroeder did not make the alleged statement.

Employee Lynch testified Mr. Connor questioned him about union activities and expressed the fear that he would lose his job if the union came in. In his supervisory capacity the fact that the union had not worked out for him previously, the asserted reason for the statement (Tr. 99), would not cause Mr. Connor concern in his present job. This discredits the allegation of such statements.

Mr. Davis testified that in the middle of June he went to Mr. Eichar's office to report an injury and that Eichar's first comment was that he had heard a rumor of unionization. According to Davis, he then quite conveniently pointed out to both Eichar and Connor, who was also there, that he was in favor of the union (R. 15; Tr. 14). Davis' testimony of the conversation continued as if taken from a text on

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[3] All dates herein refer to the year 1965 unless otherwise designated.

how to commit an unfair labor practice. All of these statements were supposedly made two days after a meeting of respondent's supervisors where they were specifically advised about comments to employees.

The General Counsel attempts to make the extension of vacation benefits, which had previously been in force in respondent's other plants, to the one here in question appear as an unfair labor practice. Mr. Davis' testimony was that when called in to have the vacation explained the session started with talk about the union. All of the other eleven employees getting this benefit indicated that there was no such discussion (Tr. 342). These benefits were given, not promised, and there is nothing, not even the incredulous testimony of Mr. Davis, that would indicate the vacations were promised in return for promises to refrain from supporting the union (R. 14; Tr. 18).

The Supreme Court has stated that:

> "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a *reasonable mind* might accept as adequate to support a conclusion." *N.L.R.B.* v. *Columbian Co.*, 306 U.S. 292, 300. (emphasis added).

The General Counsel seeks to support all but one of the 8(a)(1) allegations by the uncorroborated testimony of Mr. Davis, a highly interested witness, who stands to profit from a substantial back pay award. Not only is Mr. Davis' testimony uncorroborated but it is strangely contradicted in every significant facet

by the testimony of supervisors and fellow employees alike.

Even if the implausible testimony of Mr. Lynch were to be credited, this would constitute but an isolated incidence of interrogation, completely devoid of any interference, threat or coercion.

II. The record does not support the Board's finding, in contradiction of that of the trial examiner, that respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Davis because of his union activity.

A. The record as a whole does not offer substantial evidence that respondent discharged Davis because of his Union activity.

On this point of discriminatory discharge the decision of the Board differed from that of the Trial Examiner. In such a situation the Court has a special duty to examine the evidence. *N.L.R.B.* v. *Tru-Line Metal Products Co.*, 234 F.2d 614, 615 (C.A. 6); *Burke Golf Equipment Co.* v. *N.L.R.B.*, 284 F.2d 943, 944 (C.A. 6).

When Davis was first hired he was recognized as having the potential to become a valuable employee if he could overcome attitude and temperament problems. His attitude finally deteriorated in the last few weeks of his employment to the point he was discharged (Tr. 249, 380).[4] Illustrative of this attitude

[4] It is admitted that Davis was given fast promotion up to the time just prior to his discharge. But, this is not inconsistent with the Company's always having apprehension about his performance. Rather, it shows that Davis was typical of

was Davis' threatening to beat up a guard on July 16 (Tr. 241, 373), walking off the job when he was supposed to be working during the vacation period (Tr. 244, 375), disregarding or walking away from his supervisors when they addressed him (Tr. 249), and throwing temper tantrums and temporarily leaving his machine (Tr. 373). During the period he operated the trimmer, Mr. Davis caused a continual problem from lugs being thrown out of alignment (R. 17, 19; Tr. 207, 245, 282, 283, 289, 298). Four witnesses stated that during Davis' last month of employment the blowing of the millwright whistle for the trimmer increased (Tr. 207, 241, 245, 278). Mr. Hartwig, a millwright, testified that whistles for the trimmer became so frequent the last week Mr. Davis worked that he became suspicious as to how the lugs were being knocked out so often (R. 19; Tr. 206). He also testified there was a great amount of good lumber going into the chipper from Davis' trimmer. Mr. Reynolds, another millwright, verifies this (Tr. 27).

Because of these problems, Mr. Hartwig watched Davis from a catwalk and observed him deliberately kick the lugs out of line. When Davis did this it necessitated shutting the trimmer down and caused a back up of lumber there. In order to catch up Davis would either slash, mistrim or not trim at all, swamping the hula saw (Tr. 271, 114). Hartwig reported

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the talented but temperamental: He always had a good potential but at the same time created problems. The Company tried to indulge Davis for a time, hoping that he would develop into the top employee he was capable of becoming. Finally, the problems were too great, and Davis was discharged.

this to Mr. Connor, suggesting Mr. Davis be told to fix his own lugs (Tr. 210, 245). On July 16, Mr. Connor told him to do so (Tr. 244). Mr. Davis admitted this (Tr. 55). Nevertheless, three employees testified the problem continued (Tr. 213). The trial examiner specifically found that Hartwig and Connor believed that Davis was intentionally kicking the lugs out of line and slashing lumber (R. 19).

Mr. Connor testified that because of Mr. Hartwig's report he observed Mr. Davis at work the next day, July 16, and saw Davis slashing and mistrimming (Tr. 245, 255). Mr. Connor then independently decided that Mr. Davis must be discharged (Tr. 246, 250, 251, 252).

After Davis' discharge, there was less remill and mistrim (Tr. 364, 288, 333). Also, the problem of lugs being knocked out of line virtually disappeared (Tr. 288, 278, 304, 382, 272).

B. The N.L.R.B. improperly used a legal presumption to find that the General Counsel had established a prima facie case of discriminatory discharge.

The N.L.R.B.'s Decision and Order finding Davis' discharge to have been discriminatory is based upon a presumption which is applicable in some extreme situations, but not under the facts of the present case. An analysis of the present facts and the authorities cited in the Board opinion and by the General Counsel demonstrates this.

In *Montgomery Ward & Co.* v. *N.L.R.B.*, 107

F.2d 555 (C.A. 7) the employer discharged 23 employees from three departments, 96% of whom were union members. In addition, the manager delivered four speeches vituperatively attacking the union and threatening to close the plant if the union struck.

In *N.L.R.B.* v. *Dant & Russell, Ltd.*, 207 F.2d 165 (C.A. 9) one of the dischargees was on the union standing committee, and he held this position when the union struck for one month. There were numerous statements made by management officials expressing their desire to rid themselves of the two employees who were subsequently discharged. The two employees had not been criticized about their work during the three days prior to the discharge.

Similarly in *Virginia Metal Crafters, Inc.*, 158 N.L.R.B. No. 90 the discharged employee had worked for the respondent for some eight and one half years. Upon the advent of the union, he was discharged without warning. The employee was told several times that the reason for his discharge was his bad attitude toward the company. The manner in which the employee's bad attitude was brought home to him left little doubt he was being discharged for his support of the union.

An employee who had an unblemished work record for nine years was discharged in *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, 362 F.2d 466 (C.A. 9). He was active in support of a new union; serving in its organization and then as vice president, steward and member of the grievance committee, and was dis-

charged immediately after bringing a grievance. The alleged ground of discharge was insubordination to a supervisor. However, the supervisor did not even testify at the trial.

A female employee who had been a strong union organizer was discharged on the union election day, purportedly for playfully defacing a single apple on the canner's production line in *N.L.R.B.* v. *Sebastopol Apple Growers Union*, 269 F.2d 705 (C.A. 9). Such horseplay was common, and no one else had ever been discharged because of it.

In *N.L.R.B.* v. *Griggs Equipment Co.*, 307 F.2d 275 (C.A. 5) an employee of ten years who was an active union organizer was discharged at the height of union activity. No reason was given at the time. The company later said it was because of his breaking into a candy machine eight months earlier, and his inability to perform his work because of a physical handicap with which he had been afflicted all during his employment.

None of the factors which gave rise to a prima facie case in the decisions relied upon the Board and cited by the General Counsel are found in the present matter. In fact, the Trial Examiner found absolutely no pattern of discrimination, (R. 19, lines 14-16).

The decisions relied upon by the General Counsel required a finding of an 8(a) (3) violation only where a prima facie case is presented establishing an anti-union motivation for the discharges, and the employer offers no evidence from which a conflicting in-

ference can be drawn. In the instant matter, the Examiner, viewing the record as a whole, found that no such prima facia case had been established by the General Counsel, (R. 19, Lines 7-16, 20, Lines 1-6). Further, he found that respondent presented credible evidence from which conflicting inferences could be drawn (R. 19, Lines 55-60). Even though the Examiner discredited testimony that management personnel watched Davis "slash" 5,000 feet of lumber on one occasion and 1,000 feet on another he did not discredit all of the testimony of sabotage (R. 18, Lines 56-60, 19, Lines 42-52 and 56-59). The Examiner also found that the discharging supervisor was convinced Davis was deliberately throwing lugs out of line, not fixing them himself, contrary to instructions, and slashing good lumber (R. 19, Lines 55-60).

Not only did Davis cause an inordinate amount of trouble with the lugs being knocked out of line (R. 17, 95; Tr. 207, 241, 245, 278, 282, 283, 289, 298) and timber being lost from mistrimming, but he also threatened to beat up a guard shortly before his discharge (Tr. 241, 373), walked off the job when he was supposed to be working during the vacation period (Tr. 244, 375), disregarded or walked away from his supervisors when they addressed him (Tr. 249), and threw temper tantrums and temporarily left his machine on occasion (Tr. 373). Davis' union activities were known to the company for many weeks before his discharge. In fact, it appears that at the time of the discharge his interest in the union had decreased (R. 19, 20). This does not match the classic

prima facie case by presumption. The Trial Examiner recognized the importance of these factors when he stated he lacked conviction that respondent discharged Davis because of union activity and that he was unsure whether or not respondent even believed Davis had more than a passive interest in the Union at the time of the discharge (R. 19, 20). Even if the discharge had closely followed the start of Davis' union interest, or had been made while it continued, the prima facie case would not have been established. If such a situation had been coupled with a good work record on the part of Davis, there would have been a stronger argument for raising a presumption. But here we have nothing of this.

As the Court stated in *Montgomery Ward* v. *N.L.R.B.*, supra, at page 560:

> ". . . or does the evidence advanced by the employer merely give rise to another and inconsistent inference? If the most that can be said after all the evidence is in and each side has rested is that the evidence picture permits conflicting inferences, it is not enough."

The Court in *Lozano Enterprises* v. *N.L.R.B.*, 347 F.2d 500, 503 (C.A. 9) set forth the premises upon which the evidence in the instant matter is to be viewed:

> ". . . With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inferences that an illegal—not a proper

—motive was its cause. *An unlawful purpose is not lightly to be inferred.*" (Emphasis added)

Viewing the record as a whole in the present case, precedent probihits the finding of an 8(a)(3) violation. Respondent has presented sufficient credible evidence to raise conflicting inferences as to the motivation for Davis' discharge.

III. Assuming that Davis' discharge was discriminatory, the N.L.R.B.'s order of reinstatement is improper in light of the violence and threatened violence by Davis immediately prior and subsequent to his discharge.

Prior to his discharge, Davis had engaged in physical and oral altercations on several instances, by his own admissions (Tr. 40-44). And subsequent to his discharge Davis, knowing Superintendent Eichar had not given him a good recommendation, called Eichar and inquired what kind of a recommendation had been given. Davis became angry at his response and threatened to "beat him up," stating it would be worth $50.52 (presumably the fine for such an offense) to do so. And, when questioned about the incident at trial, Davis reiterated the same resentment against Eichar which he had expressed at the time of the threat (Tr. 61-62).

It has been clearly established that the Act will not require reinstatement of an employee who, subsequent to his discharge, threatens a supervisor with physical violence. *N.L.R.B.* v. *Bin-Dicator Co.*, 356 F.2d 210 (C.A. 6); *N.L.R.B.* v. *Trumbull Asphalt Co.*

of Del., 327 F.2d 841, 846 (C.A. 8); *N.L.R.B.* v. *National Furniture Mfg. Co.*, 315 F.2d 280 (C.A. 7); *N.L.R.B.* v. *Valley Die Cast Corp.*, 303 F.2d 64, 66 (C.A. 6); *N.L.R.B.* v. *Kelco Corp.*, 178 F.2d 578 (C. A. 4). This is particularly true in a situation such as the present one where the employee has demonstrated a propensity to engage in physical combat, his hostility toward the particular supervisor persists, and he possesses the prodigious size, six feet four inches and 245 pounds (Tr. 29), necessary to carry out his threat.

This is unlike *N.L.R.B.* v. *M. & B. Headwear Co.*, 349 F.2d 170 (C.A. 4) where there was vile language and slapping by a girl. Davis is a huge man with a short temper who by his own admissions engaged in threats and fights during the course of his employment. And, the premeditation of Davis' threat, taken together with a lack of repentence for the misconduct and an unchanged attitude toward Eichar, indicate Davis would be likely to actually use violence if reinstated.

This is not a situation where an employer aggravated an employee into violence and then used this violence as a reason for discharge. (See Appellant's Brief page 16, note 16). Threats in such a situation do not bar reinstatement because to do so would defeat the policies of the Act. But, by the same reasoning, an improperly discharged employee will only be reinstated when that remedy serves to effectuate the policies of the Act. *Iowa Beef Packers, Inc.* v. *N.L R.B.*, 331 F.2d 176 (C.A. 8). In the present situation

reinstatement would defeat those policies by giving the benefits of the Act to one who intentionally ignored its provisions for peaceful settlement of disputes.

Davis knew that Eichar's recommendation had not been good. His inquiring of Eichar as to the nature of his recommendation in such a situation can only be concluded as antagonistic. It also eliminates the possibility that the threat which flowed from the conversation was a spontaneous reaction to injustice, or "a moment of animal exuberance" which would be justified and allow reinstatement. *Milk Wagon Drivers Union of Chicago Local* 753 v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293, 61 S. Ct. 552, 85 L. Ed. 836. It could have been nothing more than a premeditated attempt to take things into his own hands. With such an attitude continuing, it is difficult to imagine that there could be a satisfactory employer-employee relationship maintained. Even in the absence of violence where there is a conflict of this magnitude between employer and employee reinstatment will not be ordered. *N.L.R.B.* v. *National Furniture Mfg. Co.*, 315 F.2d 280 (C.A. 7).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue denying the Board's order.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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